CONSTITUTIONAL AND LEGAL PROBLEMS
WITH HB 148, EDUCATION VOUCHERS

1. Utah Constitution Art. I, Sec. 4 provides:

   "No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or for the support of any ecclesiastical establishment."

   Currently, it is true that money goes directly for special educations services to children at religious schools. But there are specific qualifiers, per the U.S. Supreme Court, primarily in *Agostini v. Felton:*

   - Title I students in New York attending private schools received Title I assistance, however:
     –only **public school** employees could be Title I teachers and counselors
     –assignments were made to Title I schools w/o regard to wishes of schools or employees. (Most employees worked at schools where religions were different than their own.)
     –Title I teachers were given detailed instructions about their written and oral interactions w/students, including emphasizing the secular purpose of Title I.
     –Materials could only be used for Title I programs; they could not team teach w/private school teachers; they answered only to public school supervisors; they could not become involved w/religious activities at the school; religious symbols had to be removed from Title I classrooms.

- Where the U.S. Supreme Court has said that special education services may be provided to children attending private and parochial schools, the Court has consistently held that those services are constitutional ***only where the services are not available at the public school and IEP teams conclude that services may be provided at the private/religious schools.*** The 1st Circuit Court explained in *Gary S. v. Manchester* (374 F.3d 15, 2004):

  > "Persons opting to attend private schools, religious or otherwise, must accept the disadvantages as well as any benefits offered by those schools. They cannot insist, as a matter of constitutional right, that the disadvantages be cured by the provision of public funding. It follows that denying the benefits here, to which appellants have no cognizable entitlement, do not burden their free exercise rights."

- The *Utah* Supreme Court, in *Society of Separationists v. Whitehead*, 870 P.2d 916 (Utah 1993) *did* determine that "When the state is neutral, any benefit flowing to religious worship, exercise, or instruction can be fairly characterized as indirect because the benefit flows to all those who are beneficiaries of the use of government money or property."

- ***However,*** former Chief Justice Zimmerman reminds us that: "If a statute 'in the slightest degree introduced sectarian education and observance into the public schools, had a tendency to aid or support religious schools or a religious faith, we would cast it aside.' (*Gubler v. Utah State Teachers' Retirement Bd.)* In light of this history, church and state must be strictly separated in the education context, even it is more relaxed in other contexts."

2. Utah Constitution Article X, Sec. 1 refers to ". . .the state's education systems."

    - Historically, these "systems" have included public education, higher education, trade schools, ATCs, and, most recently, public charter schools. The "public education system" must "be open to all children of the state."

    - If private/religious schools are considered part of the "education systems," they must be available to all children regardless of their parents' ability to pay. [Note, the *Zelman* case–see additional information below for cite–set a $250 cap for additional tuition that participating private schools could charge low income parents.]

3. Utah Constitution Article X, Section 3:

    - The "general control and supervision of ***the public education system*** shall be vested in the State Board of Education."

    - If private/religious schools are now to be considered part of the state's education system (because they were so designated by the Legislature in order to receive vouchers), they must be under the State Board of Education. The Board Rules should now apply to these schools–regular reports, student accountability, days and hours of instruction, licensing of teachers (including required criminal background checks) etc.

    - [Note that in the Milwaukee program, the State Superintendent approves eligible private schools, based on criteria provided in state law.]

4. Utah Constitution Article X, Sec. 8 provides:"No religious or partisan test or qualification shall be required as a condition of employment, admission, or attendance in ***the state's education systems."***

    - If private/religious schools are designated by Legislature as part of the state education system," they can have no "religious qualification" for students.

    - [Note that in Milwaukee program, participating religious schools agreed to have *no religious instruction requirement* for voucher students.]

    - [Note in *Zelman v. Simmons-Harris* (536 U.S. 639, 2002), the only state voucher program upheld by the U.S. Supreme Court, the participating religious schools were specifically not allowed to select students based on religion.]

Additional constitutional and legal issues:

1. U.S. Supreme Court in *Zelman* ruled that there must be "true private choice" for a voucher scheme to be constitutional. In *Zelman,* parents could choose to take a stipend to neighboring **public** schools, in addition to the choices of private or religious schools. Lines 70-71 of HB 148 suggest "genuine and independent private choice," but do not provide so in excluding a parent stipend for public schools.

2. *Zelman* specifically did not allow participating religious schools to use religion as a criteria for student selection. The Milwaukee program specifically does not allow participating religious schools to require students to have religious instruction. Does line 62 in HB 148 mean that religious schools cannot give religious preference? Not "neutral with respect to religion" (line 67) if religious schools can prefer students based on religion.